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# A Container Should Never Be a Package: Going beyond Mitsui v. American Export Lines, Inc.

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# A Container Should Never Be a Package: Going Beyond *Mitsui v. American Export Lines, Inc.*

## I. Introduction

Section 1304(5) of the Carriage of Goods by Sea Act of 1936[1] limits a carrier's and ship's liability "for any loss or damage to or in connection with the transportation of goods"[2] to $500 per package.[3] COGSA was enacted when packages were generally small; the $500 limitation provision did not foresee containerization, a cost efficient means of transporting goods by sea in large metal boxes usually eight feet by eight feet by twenty or forty feet.[4] *Mitsui v. American Export Lines, Inc.*,[5] a recent Second Circuit Court of Appeals decision, concerns the application of the $500 package limitation to the shipments of goods in containers. *Mitsui* held that when the bill of lading[6]

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1. 46 U.S.C. §§ 1300-1315 (1976) [hereinafter referred to as COGSA].

2. *Id.* § 1304(5).

3. 46 U.S.C. § 1304(5) provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

*Id.*

4. *See* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 814 (2d Cir. 1971). *See generally* BRANCH, ELEMENTS OF SHIPPING 210-14 (1975). The benefits of containerization include door to door service, a decrease in damage and pilferage, less time in port for loading and unloading, a decrease in labor costs, and more favorable insurance premiums. This method of transportation started to become a major aspect of the marine industry in the mid-1960's.*Id.*

5. 636 F.2d 807 (2d Cir. 1981). The *Mitsui* decision is a consolidation of two decisions: Mitsui v. American Export Lines, Inc., which dealt with tin ingots, and Armstrong v. American Export Lines, Inc., which dealt with rolls of carpet. These two cases will be hereinafter referred to as *Mitsui*.

6. A bill of lading is the "contract between the shipper and the carrier. It defines the rights, duties, exemptions, and limitations of the parties, whether imposed by statute or the result of voluntary agreement." Jones v. The Flying Clipper, 116 F. Supp. 386, 388 (S.D.N.Y. 1953) (footnote omitted).

discloses the contents of the container and the container is furnished or owned by the carrier, such container is not a package as used in section 1304(5).[7]

This note discusses the criteria used by the different circuits and by the *Mitsui* court in defining "package" as that term is used in COGSA section 1304(5). It describes and analyzes the reasoning of the *Mitsui* court and then criticizes the court for limiting its holding when it had the opportunity to announce a new standard which would promote uniformity and predictability. The note concludes that the purposes[8] of COGSA section 1304(5) would be more satisfactorily achieved if the courts would recognize that a container should *never* be a package for purposes of carrier liability under COGSA section 1304(5). Further, it is recommended that Congress adopt a container limitation which would serve the purposes of COGSA when goods are shipped in containers.

## II. Background

The principal purpose of the COGSA package limitation was to set "a reasonable figure below which the carrier should not be permitted to limit his liability."[9] Another important purpose was to establish international uniformity,[10] thus promoting fairness in matters relating to ocean bills of lading for all those engaged in marine transportation.[11] By describing a unit of ascertainable size in line with a "common sense standard," the Second Circuit has noted that the package limitation promotes

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7. Mitsui v. American Export Lines, Inc., 636 F.2d at 821. *See* Edelman, *Cargo Claims Involving Containers*, N.Y.L.J., March 6, 1981, at 1, col. 1.

8. *See infra* notes 9-12 and accompanying text.

9. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d at 815.

10. *See* Hartford Fire Ins. Co. v. Pacific Far East Line, Inc., 491 F.2d 960, 962 (9th Cir. 1974); International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 157 (1931-32).

11. *See* H.R. REP. No. 2218, 74th Cong., 2d Sess. 7 (1936) (quoted in Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 14-15 (2d Cir. 1969)). The House Report stated:

> [T]he uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading.

*Id.*

uniformity of bills of lading, thereby reducing litigation.[12]

Section 1304(5) was enacted principally to protect shippers from carriers who were otherwise able to limit their liability to insubstantial amounts by injecting clauses into bills of lading which the shippers could not refuse.[13] Carriers, originally liable for virtually all cargo losses,[14] began to compel shippers to agree to contracts which set the carrier's liability at nominal amounts.[15] These contracts were regarded by Congress as adhesion contracts because the shippers were in a weak bargaining position.[16]

The courts have recognized the primary reason for the enactment of the package limitation and its purposes, but they

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12. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

13. *See, e.g.*, Hartford Fire Ins. Co. v. Pacific Far East Line, Inc., 491 F.2d at 962 (citing *Carriage of Goods by Sea, 1935: Hearings on S. 1152 Before the Comm. on Commerce*, 74th Cong., 1st. Sess. 15, 47 (1935)). COGSA was designed to establish more equitable carrier liability without a corresponding increase in freight rates. *Id. See also* Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 517-19, 535-36 (1974).

Congress' concern for the shipper is also reflected in COGSA § 1303(8) which provides:

> [A]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect . . . .

46 U.S.C. § 1303(8) (1976).

14. Prior to 1936, carriers were held absolutely liable for all cargo losses save those arising from an Act of God or the Public Enemy. Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 517-18 (1974). COGSA changed carriers' absolute liability; 46 U.S.C. § 1304(1) (1976) provides that:

> [N]either the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe . . . .

*Id.* Carrier liability exemptions are found in 46 U.S.C. § 1304(2). The exemptions extend well beyond losses arising from an Act of God or the Public Enemy, including "act, neglect or default of the master . . . or the servants of the carrier in the navigation or in the management of the ship." *Id.* at § 1304(2)(a). *See* Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. L. & COM. 441, 441-42 (1972).

15. *See* Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. L. & COM. 441, 441-42 (1972).

16. *See id.*

have varied its application.[17] The inconsistent application is due, in part, to insufficient guidance from Congress in the form of a definition of "package," and to changes in the size of the package unit through containerization. When confronted with the issue of whether a container is a package within section 1304(5), the courts have principally relied on the following factors:[18] the ownership of the container;[19] the information on the bill of lading;[20] and the nature of the contained goods.[21]

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17. *See infra* notes 18-21.

18. Additionally, courts have considered other factors. *E.g.*, Shinko Boeki Co. v. S.S. Pioneer Moon, 507 F.2d 342, 345 (2d Cir. 1974) (2,000 gallon tanks containing liquid latex are not packages since they are more analogous to a functional part of the ship than to 55 gallon drums previously used by shippers in transporting liquids); Mitsubishi Int'l Corp. v. S. S. Palmetto State, 311 F.2d 382, 384 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963) (fully boxed roll of steel is a package notwithstanding size and weight of 32 tons); Gulf Italia Co. v. American Export Lines, Inc., 263 F.2d 135, 137 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959) (partially enclosed tractor is not a package); Rosenbruch v. American Export Isbrandtsen Lines, Inc., 357 F. Supp. 982, 985 (S.D.N.Y. 1973), *aff'd*, 543 F.2d 967 (2d Cir.), *cert. denied*, 429 U.S. 939 (1976) (container holding household goods of a single shipper held to be a package because the shipper packed the container and because uniformity of result and simplicity of approach would be achieved); Lucchese v. Malabe Shipping Co., 351 F. Supp. 588, 590 (D. Puerto Rico 1972) (trailer with flat rate charged rather than the customary rate based on tonnage of cargo is a package).

19. *See, e.g.*, Rosenbruch v. American Export Isbrandtsen Lines, Inc. 357 F. Supp. at 985. Plaintiff's household goods were placed by the shipper in a container which was owned by the shipping company. The shipper indicated on the bill of lading the number "1" under the column "Number of Containers or Other Packages." The cargo was worth $102,917.08 but the court determined that the container was a package and limited the carrier's liability to $500. The court stated that ownership, along with the general intent of the parties, must be considered. *Id.* at 984-85. *But see* Simon, *Latest Developments In The Law of Shipping Containers*, 4 J. MAR. L. & COM. 441, 447 (1972). The ownership of the container is immaterial; a reliance on this factor is an "invitation to inquire into evasive and irrelevant matters." *Id.*

20. *See* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971). Leather worth $155,192 was loaded into 99 cartons. Each carton was wrapped with steel (thereby qualifying them as bales) and then placed into one container supplied by the carrier. The bill of lading indicated "1 container said to contain 99 bales of leather." *Id.* at 804. Due to the disclosure on the bill of lading and the carrier's ownership of the container, the court determined that each bale was a package. Id. at 814-16. *See also* Lucchese v. Malabe Shipping Co., 351 F. Supp. at 590, 592-93. *Cf.* U.S.C. § 1303(8) (1976), which states that "[a]ny clause . . . in a [bill of lading] relieving the carrier . . . from liability for loss or damage to . . . goods . . . shall be null and void and of no effect. *Id. But cf.* Shinko Boeki Co. v. S. S. Pioneer Moon, 507 F.2d 342 (2d Cir. 1974). That court determined that tanks carrying liquid latex were not packages despite the wording on the bill of lading. *Id.* at 345.

21. *See infra* notes 22-24 and accompanying text.

The Second Circuit focused on this last factor to formulate the functional economics test of *Royal Typewriter Co. v. M/V Kulmerland.*[22] The court held that so long as the contents of the container were packaged inside the container in the manner that would have been necessary had they been transported in the holds of the ship, they were deemed "functional package units" or "funcional economic units."[23] The court found the units within the container not to be functional;[24] the carrier's liability was thus limited to $500.[25] The *Kulmerland* court, for all practical purposes, exonerated the carrier from liability, creating the inequitable result Congress sought to prevent in enacting COGSA.[26]

The functional economics test has been criticized[27] and has not been followed by the courts.[28] The Second Circuit, in *Shinko*

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22. 483 F.2d 645, 648 (2d Cir. 1973).

23. *Id.* at 648-49. In *Kulmerland* the shipper was sending 350 cartons of adding machines valued at $29,000 packaged in one container. *Id.* at 646. The adding machines were individually packaged in "little cardboard cartons, stapled and paper-taped." *Id.* at 649. This type of packaging was not used in breakbulk shipments before containerization; rather, adding machines were traditionally packed in wooden cases or crates. *Id.*

24. *Id.* at 649.

25. *Id. See* De Orchis, *The Container and the Package Limitation -The Search for Predictability,* 5 J. MAR. L. & COM. 251, 257 (1974) (the functional economics test requires the shipper to forego the economies of containerized packaging by compelling him to package his units as if they were unprotected by the container). *See also* Simon, *The Law of Shipping Containers,* 5 J. MAR. L. & COM. 507, 523 (1974) ("in the name of economic functionalism, the [*Kulmerland*] decision fosters economic waste").

The *Kulmerland* court set forth the following evidentiary rules: If the units were functional, a presumption that the units were the packages was established and the burden was on the carrier to show otherwise; similarly, if the units were not functional, the burden was placed on the shipper to show that the units were the packages. This burden could be satisfied by showing the intent of the parties and by establishing that the units were customarily shipped breakbulk. Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d at 649.

26. *See supra* notes 13-16 and accompanying text.

27. *See, e.g.,* Simon, *The Law of Shipping Containers,* 5 J. MAR. L. & COM., 507, 520-32 (1974). Cartons have traditionally worked as packages; if they are not to be considered packages, what is their classification? "The use of the term 'functional' . . . is unrealistic . . . . [a] thing is functional if it works." *Id.* at 522; De Orchis, *The Container and the Package Limitations - The Search for Predictability,* 5 J. MAR. L. & COM. 251, 257 (1974). Both shipper and carrier have reason to complain about the functional economics test. The test "affords no predictability for the carrier . . . and leaves it in the dark when it comes to buying insurance." *Id.* Avoiding the limitation applied in *Kulmerland* requires the shipper to expensively package his goods, thus creating economic waste. *Id.*

28. *E.g., In re* Tug Dorothy H., 478 F. Supp. 383, 392 (E.D. Va. 1979). Regarding the

*Boeki Co. v. S. S. Pioneer Moon*,[29] refused to follow *Kulmerland* and looked instead to the holding of *Leather's Best, Inc. v. S. S. Mormaclynx*.[30] *Leather's Best* defined the metal container as "functionally a part of the ship."[31] The *Shinko* court held that containerized tanks of liquid cargo were not packages and were more closely analogous to the tanks in the holds of the ship than to the 55 gallon drums previously used for the shipment of liquid cargo breakbulk.[32]

Although *Kulmerland* was decided after *Leather's Best*, it did not overrule it.[33] The two cases were premised on entirely different principles. The *Kulmerland* court focused on the functional nature of the units within the containers;[34] the *Leather's*

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functional economics test as "too narrow," the court established a list of 12 criteria to determine whether the container was the package. *Id.*; Matsushita Elec. Corp. v. S. S. Aegis Spirit, 414 F. Supp. 894, 904 (W.D. Wash. 1976). The court found the functional economics test unsatisfactory and violative of the judicial rule that courts should encourage good commercial practices and refrain from "creating disincentives to mercantile economization." *Id.* (footnote omitted); *Accord* Hartford Fire Ins. Co. v. Pacific Far East Line, Inc., 491 F.2d 960, 963 (9th Cir. 1974). The court held that a large electrical transformer, intended for outside use, attached to a wooden skid, was not the package. The court took special note of the fact that since the legislators did not attach a technical meaning to the word "package", it would be construed according to the ordinary man standard. *Id.*

29. 507 F.2d 342 (2d Cir. 1974).

30. 451 F.2d 800 (2d Cir. 1971). Shinko Boeki Co. v. S. S. Pioneer Moon, 507 F.2d at 345.

31. Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d at 815.

32. Shinko Boeki Co. v. S. S. Pioneer Moon, 507 F.2d at 345. *Shinko* distinguished *Kulmerland* on the grounds that the bill of lading in *Kulmerland* did not disclose as much information as the bill of lading in *Shinko* and that the functional economics test was not helpful in shipments of liquids. *Id. But see* Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 608 (1975). The Second Circuit in *Shinko* refused to follow *Kulmerland* as evidenced by the fact that the shipper had previously shipped the liquid in 55 gallon drums. *Id.*

33. *See* Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d at 649. The *Kulmerland* court distinguished *Leather's Best* on the ground that the bales of leather could have been shipped without a container and were thus functional. *Id.*

34. *Id.* at 647-48. The *Kulmerland* court rejected the importance of the *Leather's Best* requirement of disclosure of the units within the carrier-owned or carrier-supplied containers. The court reasoned that ownership of the containers is not important because: (a) The container is used for the benefit of both the shipper and the carrier and it is not an integral part of the shipment; and, (b) containers do not become the property of the consignees but are reused by the owner for as many different shipments as possible. The court further reasoned that disclosure is irrelevant because it cannot be verified. *Id.* at 647.

*Kulmerland* attributed the *Leather's Best* outcome to the difficult question that the

*Best* court focused on the ownership of the containers, as well as the intent of the shipper and the carrier as exemplified by the information on the bill of lading.[35] Further, the *Leather's Best* court, after recognizing conflicting arguments,[36] adhered to the primary purpose of COGSA,[37] and held that under the circumstances of the case, the determination of the package was "more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be 'contained.' "[38] Notwithstanding this declaration, *Leather's Best* left open whether a container would be a package for purposes of COGSA when the bill of lading does not state the number of cartons or when the container was owned or furnished by the shipper.[39]

The foregoing line of cases demonstrates the need for a definition of package, particularly as it applies to a shipping container. Some standard must be developed so that the burden of risk, at the time of contract, is placed on either the shipper or the carrier[40] and so that the purposes of COGSA are upheld.

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court was faced with in light of *Standard Electrica* and the current developments of containerization and palletization in ocean transportation. *Standard Electrica* had held that nine pallets containing cardboard cartons of television timers were packages because: (1) The bill of lading only indicated "9 pallets" under the heading "packages;" (2) each pallet had the physical characteristics of a package; and, (3) the shipper chose the pallet because of its convenience. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d at 946. The *Kulmerland* court's functional economics test was designed to provide certainty in the law so that litigation would be avoided, a goal *Leather's Best* apparently did not achieve. *See* Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d at 649.

35. Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d at 814-16.

36. *Id.* at 815. The court recognized that there was merit to the contention that if the containers were treated as packages, it would promote uniformity and predictability; the court also noted that the argument about the weak bargaining position of the shipper may not be applicable where the shipper fully packs the shipments of containers. *Id.*

37. *Id. See supra* note 9 and accompanying text.

38. *Id.* at 815. (footnote omitted).

39. *Id. Contra* Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. L. & COM. 441 (1973) (container is not a package was clear holding of *Leather's Best*).

40. *See* De Orchis, *The Container and the Package Limitation -The Search for Predictability*, 5 J. MAR. L. & COM. 251 (1974). In balancing the need for predictability with increased transportation costs, the shipper should be given the option of declaring the container as the package, or declaring the value and freight. *Id.* at 279. DeOrchis favors placing the burden on the shipper because the cargo insurance the shipper

## III. Facts

The defendant in *Mitsui v. American Export Lines, Inc.*,[41] owned and operated the containership *Red Jacket*.[42] Containers of tin ingots and rolls of carpet were loaded onboard the *Red Jacket* and, thereafter, lost during a storm at sea.[43] The defendant was held liable for the losses in an earlier decision.[44] All damage claims were settled with the exception of (a) the claim of the consignees of the 1,834 tin ingots placed in five containers;[45] and (b) the claim of the shippers of the 1,705 rolls of carpet placed in 13 containers.[46] These remaining claims were consolidated by the district court and the Second Circuit.[47]

The containers which held the ingots and carpet were owned by the defendant and given to the shippers for packing.[48] They were returned to the defendant packed and sealed by the shippers at the shippers' premises.[49] It was the intention of the shippers and the defendant to forward the containers unopened to the consignees.[50] Because the defendant did not verify the contents of the sealed containers, he stamped the bill of lading for the carpet "Shipper's Load & Count."[51] The bills of lading

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purchases is cheaper than the Privilege and Indemnity Insurance the carriers purchase. *Id.* at 277. *See also* Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 616 (1975). Insurance should not be considered in the legal definition of the word "package;" such considerations are outside the scope of legal issues. *Id. See supra* note 12 and accompanying text.

41. 636 F.2d 807 (2d Cir. 1981).

42. *Id.* at 810.

43. *Id.*

44. *Id.* In Houlden & Co. v. S.S. Red Jacket, 582 F.2d 1271 (2d Cir. 1978), *cert. denied*, 439 U.S. 1128, *rehearing denied*, 440 U.S. 968 (1979), American Export Lines was held liable for the loss of 43 containers and the damage of seven containers.

45. Mitsui v. American Export Lines, Inc., 636 F.2d at 810-11. The containers used for both the ingots and the rolls of carpet were 8 feet high, 8 feet wide and 20 feet or 40 feet long. *Id.* at 811.

46. *Id.* at 810.

47. *See supra* note 5.

48. Mitsui v. American Export Lines Inc., 636 F.2d at 811.

49. *Id.*

50. *Id.*

51. *Id.* at 812. A carrier affixes such a stamp to the bill of lading to indicate that he is not accepting, as his own, the shipper's numbers, and to show that the contents of the containers were not verified. The phrase "said to contain" also shows the carrier's qualification of the numbers on the bill of lading. Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 609-10 (1975). There was no indication in *Mitsui* that the bill of lading for the ingots bore the "shippers load and count" stamp.

pertaining to both types of cargo indicated the number of containers along with the number of units said to be contained within each container.[52]

In both cases, the district court applied the package limitation to the units of cargo, i.e., each bundle of ingots[53] and each roll of carpet,[54] rather than to the containers.[55] The district court, therefore, awarded to the consignees of the ingots, $62,000.[56] The decision was based upon the usefulness of the bundles in the loading and unloading process.[57] Plaintiff consignees appealed contending that the ingots were not shipped in packages[58] and that it should be awarded the value of the cargo.[59] Defendant carrier cross-appealed contending that the containers were packages and that its liability should be limited to $2,500 (five containers multiplied by $500 package limitation).[60] With regard to the carpet, the district court found that each roll of carpet was a package and awarded the shippers the value of the carpet.[61] Defendant again appealed contending that the containers were the packages and that its liability should be

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52. Mitsui v. American Export Lines, Inc., 636 F.2d at 812.

53. Each ingot was 4 inches wide 5 inches in depth and 18 inches long with an average weight of 78 pounds. The ingots were stacked in 124 bundles of 15. The shipper inserted on the bill of lading the number of bundles of ingots within each container. *Id.* at 811-12.

54. The rolls of floor covering were on the average six feet long; each roll covered approximately 60 square yards of material and weighed from 250 to 350 pounds. Each roll was bound in Kraft paper with a disc at each extreme; a hollow cardboard roll was used to wrap the carpet around. *Id.* at 812.

55. *Id.* at 813.

56. *Id.* The $62,000 award was determined by multiplying the 124 bundles (found by the court to be the packages) by the $500 package limitation.

57. *Id.* at 813. *See infra* note 58. For different reasons the court of appeals affirmed the consignees' awards.

58. Mitsui v. American Export Lines, Inc., 636 F.2d at 813. A clause in the bill of lading fixed defendant's liability at "$500 per package or per shipping unit." *Id.* at 812. The consignees argued that the bundles of ingots were not packages and, according to the clause in the bill of lading, the $500 limitation should be applied to each shipping unit, i.e., each ingot. *Id.* at 813.

59. *Id.* 1,834 ingots multiplied by $500 would exceed the value of the cargo. 46 U.S.C. § 1304(5) (1976) states: "In no event shall the carrier be liable for more than the amount of damage actually sustained. *Id.*

60. Mitsui v. American Export Lines, Inc., 636 F.2d at 813. The defendant sought to limit its liability for the ingots to $2,500 when their value was $369,404.40.

61. *Id.* Although each roll of carpet was found to be a package, 1,705 rolls multiplied by $500 would exceed the value of the goods. *See supra* note 59.

limited to $6,500 (13 containers multiplied by $500 package limitation).[62]

## IV. The Court of Appeals' Decision

The court of appeals' inquiry began with an examination of the language of section 1304(5) and a search for the meaning of the word package.[63] The court then referred to the Senate Committee hearings in an effort to discern the purpose of the statute.[64] The court acknowledged that the purposes of the COGSA package limitation were twofold: First, to limit the carrier's liability to $500 per package; and, second, to nullify any agreement to the contrary.[65] The Second Circuit then emphasized that the carrier's duties under COGSA[66] would be meaningless if there were no significant liability imposed.[67] The requirement of due diligence[68] to make a ship seaworthy would become an empty standard; a carrier's duty to care for his cargo and take necesary precautions would not be coupled with any commercial inducement.[69]

The Second Circuit then stated that the *Kulmerland* deci-

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62. *Id.* The defendant sought to limit its liability to $6,500 when the value of the carpet was $357,946.19.

63. *Id.* at 813-14. *See also* Nichimen Co. v. M.V. Farland, 462 F.2d 319, 334 (2d Cir. 1972) (dictionary definitions may be considered in defining package).

64. Mitsui v. American Export Lines, Inc,. 636 F.2d at 814-15. *See supra* notes 9-12 and accompanying text.

65. *Id.* The court found support for the primary purposes of the Act in Gilmore & Black's interpretation of § 1304(5): "COGSA allows a freedom of contracting out of its terms, but only in the direction of *increasing* the shipowner's liabilities . . . ." *Id.* n. 6 (quoting GILMORE & BLACK, THE LAW OF ADMIRALTY § 3-25 at 145 (2d ed. 1975) (emphasis in original)).

66. *Id.* at 815. 46 U.S.C. § 1303 (1976) reads in pertinent part:

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to -

(a) Make the ship seaworthy . . .

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

*Id.*

67. Mitsui v. American Export Lines, Inc., 636 F.2d at 815.

68. *See* N. HEALY & D. SHARPE, CASES AND MATERIALS ON ADMIRALTY 484 (1974). Examples of lack of due diligence to make a vessel seaworthy include: overloading a vessel, leaving the hatches unsecured, negligent stowage, and failure to make tanks tight. *Id.*

69. Mitsui v. American Export Lines, Inc., 636 F.2d at 815.

sion was inconsistent with the decision of *Leather's Best*.[70] First, the court noted that *Leather's Best* was not based on the bales of leather being "functional" but on the disclosure of the contents of the container on the bill of lading and the fact that the container was owned or furnished by the carrier.[71] Second, under the functional economics test, the contents of a carrier-supplied container might not be considered packages because they were not functional, notwithstanding an adherence to the *Leather's Best* requirement of disclosure.[72] In other words, a shipper could comply with the disclosure requirement of *Leather's Best*, yet find that the carrier's liability would be limited to $500 per container because the units within the container were not functional. Due to this inconsistency, and because *Mitsui* and *Leather's Best* both dealt with disclosure of carrier-owned containers,[73] the Second Circuit declined to follow *Kulmerland*.[74] The court further criticized *Kulmerland* because it overlooked the possibility that the goods not in packages could be shipped as customary freight units within section 1304(5),[75] and because *Kulmerland* was at odds with the purposes of COGSA.[76]

The Second Circuit reached its decision by applying the *Leather's Best* analysis[77] to the facts in *Mitsui*.[78] It held that each roll of carpet was a package[79] because the shipper wrapped

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70. *Id.* at 818.

71. *Id.*

72. *Id.* at n.11.

73. *See supra* note 20 and text accompanying note 52. One important difference, however, between the two cases is that in *Leather's Best*, the carrier agent was present when the container was packed so that the carrier could verify the information on the bill of lading, while in *Mitsui*, the carrier's agent was not present when the containers were being packed. *See infra* notes 99-100 and text accompanying note 84.

74. Mitsui v. American Export Lines, Inc., 636 F.2d at 818.

75. *Id.* at 818-19. 46 U.S.C. § 1304(5) (1976) reads in pertinent part:

> Neither the carriers nor the ship shall in any event be or become liable for any loss or damage . . . exceeding $500 per package . . . or in case of goods not shipped in packages, per customary freight units . . . .

*Id.*

76. Mitsui v. American Export Lines, Inc., 636 F.2d at 818. *Kulmerland* was at odds with both the language of § 1304(5) and the underlying purposes of COGSA. *Id.*

77. *See supra* note 20 and text accompanying notes 35-39.

78. Mitsui v. American Export Lines, Inc., 636 F.2d at 821-23.

79. *Id.* at 821. The rolls of carpet would not have been packages had the shipper not wrapped them in preparation for transport. *Id.* If the rolls were not wrapped and thus not packages, the carrier's liability would have been determined by the customary freight

each roll and disclosed the number of rolls in the containers to the carrier.[80] The court further held that each bundle of ingots was a package and sustained the district court's award.[81]

## V. Analysis

The Second Circuit's criticism of *Kulmerland* was adequate for the immediate decision but lacked the force necessary to deal more comprehensively with the problem of the container as a package. By expounding on the purposes of COGSA as a whole and on section 1304(5) in particular, the court established the groundwork for a far reaching decision. The court proceeded with caution, however, and made it clear that "[n]othing said here, of course, covers the situation in which the bill of lading does not show how many separate packages or units there are."[82] The *Leather's Best* court propounded a nearly identical qualification[83] which led the Second Circuit to reevaluate the container problem in a subsequent decision; the result was the *Kulmer-*

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unit. The *Mitsui* court recognized that even if the rolls of carpet were not considered packages, that would not necessarily mean that the containers were packages. The $500 limit would apply per customary freight unit. *See id.* at 822. In its analysis, *Mitsui* criticized *Kulmerland* for failing to take the freight unit into consideration. *Id.* at 818-19.

80. *Id.* at 821.

81. *Id.* at 821-23. The court of appeals, however, rejected the reasoning of the district court. The district court had held that each bundle of ingots was a package because of its usefulness in the loading and unloading process. *Id.* at 813. *See supra* text accompanying notes 53-59. The court of appeals held: (a) The ingots themselves were not packages; the shipper did not bind the ingots together in any manner, and the stacking of the ingots in bundles did not make them packages; (b) the court would have applied the $500 limitation to the customary freight unit but for a clause in the bill of lading which set the level of liability at "$500 per shipping unit." In the bill of lading, shipping unit meant each physical unit (ingot); (c) Since the shipper represented on the bill of lading that the contents of the containers were 124 bundles of ingots and the carrier had no way of verifying the statements, the consignees, as the shipper's agents, were estopped from asserting that the bundles were not package; (d) The $500 limitation applied to each bundle; (e) The consignees were awarded $62,000 (the number of bundles multiplied by the $500 limitation). *Id.* at 822-23.

82. *Id.* at 821 n. 18.

83. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d at 815. In trying to distinguish Standard Electrica S. A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967), the court recognized that the differences between the two cases were not altogether satisfactory. The court, therefore, stated that it was not deciding a case where the cargo was packed in a container already on the shipper's premises and where the bill of lading did not disclose the number of units within the container. Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d at 815.

*land* decision.[84] Thus the container problem came full circle in *Mitsui*. The application of the package limitation to the container is now as ambiguous as it was after *Leather's Best*. *Mitsui* looked beyond *Kulmerland* to *Leather's Best* as the appropriate standard for determining the COGSA "package" and reaffirmed the *Leather's Best* holding that the intent of the parties was critical to the outcome of the decision.[85] According to *Leather's Best*, intent could be determined by the information on the bill of lading[86] and the ownership of the container.[87] There, the intent of the parties was clear because the carrier owned the container, and the bill of lading indicated the number of bales of leather which was verified by the carrier's agent.[88] Because the parties clearly intended that the bales of leather were the packages, the *Leather's Best* court upheld the primary purpose of COGSA, which sets "a reasonable figure below which the carrier should not be permitted to limit his liability . . . ."[89]

The *Mitsui* court adopted the criteria used in *Leather's Best*; however, the intent of the carrier and the shippers was not as clear as it was in *Leather's Best* because the information on the bill of lading was not verified. The reliability of the information on the bill of lading in determining the intent of the parties was, therefore, questionable. The court apparently did not consider section 1303(3)[90] of COGSA when it held that the shippers'

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84. *See supra* note 33 and accompanying text.

85. Mitsui v. American Export Lines, Inc., 636 F.2d at 821.

86. Leather's Best, Inc., v. S. S. Mormaclynx, 451 F.2d at 814-16. In Smythgreyhound v. M/V Eurygenes, 666 F.2d 746 (2d Cir. 1981), the Second Circuit commented that intent is not always very clear and that *Mitsui* and *Leather's Best* rejected a complex intent analysis in favor of a "clear rule that where the contents of the container are disclosed in the bill of lading then the container is not the COGSA package." *Id.* at 753.

87. *But cf.* Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. L. & COM. 441, 447 (1973). Many times the container is rented and ownership is not discernible. If ownership is a determinative factor of whether the container is a package, than many times neither the shipper nor the carrier would be able to ascertain at the time of contract who bears the risk of loss. *Id. See supra* note 34.

88. Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d at 804.

89. *Id.* at 815 (footnote omitted).

90. 46 U.S.C. § 1303(3) (1976) states in pertinent part:

> After receiving the goods into his charge the carrier . . . shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things . . .
>
> (b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

disclosure of the contents was an indication of the parties' intent. Section 1303(3) states that a carrier should not be bound by quantity or value representations on the bill of lading when the statements cannot be verified.[91] When disclosure is made by the shipper, many times the carrier will indicate an intent not to be bound by his nonverifiable figures by stamping on the bill of lading "shippers load & count."[92] Reliance by the courts on the bills of lading has been criticized: The courts should uphold the purposes of COGSA by looking to the intent of the legislators rather than relying on a bill of lading intent analysis.[93] Since the carrier is the "final arbiter" of the contents of the bill of lading, reliance on this factor in determining whether a container is a package would, very often, result in nominal carrier liability. Although a carrier might argue that he should not be liable for that which he has not observed,[94] an absolute avoidance of his liability based on this argument contravenes the purposes of COGSA.[95]

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(c) . . . *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. *Id.* (emphasis in original).

91. *Id.* § 1303(3)(c).

92. *See* Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 615-16 (1975). *See supra* note 51.

93. *Id.* "In applying Sec. 4(5) . . . it is the intention of the legislators that must be carrierd out - not the fictional 'intention of the parties' to a [bill of lading] . . . ." *Id.* at 616.

94. *See, e.g.*, Note, *The Shipping Container as a COGSA Package -The Debate Continues*, 5 MAR. LAW. 88, 91 (1980).

95. *See supra* notes 9-12 and accompanying text. The primary reason shippers do not place the number of units within the container on the bill of lading is because the carrier will not give a bill of lading with numbers he cannot verify. Upon receipt of one container, the carrier, who can verify only that particular item, will issue a bill of lading with an indication of the number of containers. Shippers accept this and refrain from putting numbers on the bill of lading. Furthermore, when there is a loss, shippers have the burden of proving the contents of the containers including the exact number of units within the containers. In refusing to give a bill of lading for anything more than the number of containers, the carriers do not anticipate their possible liability. They predicate the decision on the fact that the container is the only verifiable item. The carrier will want to know, however, the nature of the goods because the freight rate is based on the nature and weight of the goods. Other reasons shippers do not place the number of units on the bill of lading are carelessness and lack of familiarity with the case law. Telephone Interview with Seymour Simon, Member New York Bar; formerly an adviser to the Department of State on Maritime Law in connection with the Brussels Conven-

Since the container has been defined by *Leather's Best*, as well as by the United States Supreme Court,[96] as a part of the ship, the following question inevitably arises: How can the container change from a part of the ship into a package when the shipper fails to disclose the contents or when the container is owned or supplied by the shipper rather than the carrier? The container is either a part of the ship or it is a package for purposes of section 1304(5). Insofar as the *Mitsui* court has classified the container as a part of the ship and not a package *only* when there is disclosure of the contents of carrier-owned or furnished containers, it is to be criticized.[97] Arguably, carriers have legitimate interests in knowing the nature and quantity of goods within a container; as final arbiters, however, they have the opportunity to ascertain this information. An omission of such information by a shippper should not make the container a package for purposes of carrier liability.[98] Furthermore, section 1304(5) clearly states that disclosure of the nature and value of the goods is necessary only when the value of the shipper's goods individually exceeds the $500 limitation.[99] Therefore, Congress considered this disclosure in drafting section 1304(5); if it had intended that the nature and value of the goods should be dispositive of the package definition, it would have so indicated.

Insofar as the *Mitsui* court held the containers not to be packages, it upheld the purposes Congress contemplated in en-

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tion to amend the Hague Rules; Member, Braham & Simon, P.C. (Nov. 1981). *But see* De Orchis, *The Container and the Package Limitation - The Search for Predictability*, 5 J. MAR. L. & COM. 251, 279 (1974) who suggests a different approach which would place the burden on the shipper to either declare the container as the package or pay a higher freight. *See supra* note 40.

96. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 270 (1976) (container is substitute for hold of ship). *See* Simon, *More on the Law of Shipping Containers*, 6 J. MAR. L. & COM. 603, 604 (1975) (the president of a consortium of steamship companies characterized the container as part of the ship when he said that the ship is now able to meet the shippers on shore).

97. *See supra* notes 90-95 and accompanying text.

98. It would appear manifestly unfair to penalize a shipper willling to disclose pertinent information regarding his goods because the carrier refused to accept such information on the bill of lading. *Cf.* Matsushita Electric Corp. v. S. S. Aegis Spirit, 414 F. Supp. at 908 (carrier's argument that he was without knowledge of contents has no merit; his situation is "largely of [his] own making" which could be easily rectified by him).

99. 46 U.S.C. § 1304(5) (1976). The liability per container would be limited to $500 unless the nature and value of such goods were declared by the shipper, before shipment and inserted into the bill of lading. *See supra* note 3.

acting section 1304(5).[100] The court was faced with the difficult task of statutory construction in the absence of subsequent legislation. Congress enacted the package limitation in 1936 when the average package was small[101] and value did not generally exceed $500.[102] Today, goods are shipped in containers and the value of goods has increased sharply. Congress has, nevertheless, failed to amend COGSA and thereby take into consideration this new dimension in shipping and current economic realities.[103] Statutory construction has consistently led to conflicting decisions among the courts especially when technological developments alter the process which the legislation utilized to affectuate its ends. Some guidance has been necessary:

> The rules of statutory construction require that statutes should be sensibly construed to give effect to the object or policy behind the legislation; that general terms should be limited to only those things contemplated by the legislature at the time of the enactment; that courts should avoid the mischief which the statute was enacted to rectify.[104]

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100. *See supra* notes 9-12 and accompanying text and text accompanying notes 65-67.

101. *See generally* Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 519 (1974) (packages had to be small because they were manually loaded onto the ships).

102. *Id. See* 46 U.S.C. § 1304(5) (1976), *supra* note 3. If the packages individually exceeded $500, in order to protect himself, the shipper would have to insert the nature and value of such goods on the bill of lading before shipment. In this way, COGSA protects the carriers against excessive claims in respect of small packages of great value but does not permit the carriers to escape liability for just claims.

103. The Hague Rules (which were the model for COGSA) were amended in 1968 resulting in the increase of a carrier's liability from $500 to $662 per package or unit and the addition of a provision dealing with shipments of goods in containers:

> Where a container, a pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid, such article of transport shall be considered the package or unit.

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, August 25, 1968, *reprinted in* The Hamburg Rules on the Carriage of Goods by Sea 302 (S. Mankabady ed. 1978). The United States sent delegates to the Convention yet Congress has not adopted the Protocol.

104. Simon, *The Law of Shipping Containers*, 5 J. MAR. & COM. 507, 527 (1974) (citing Holy Trinity Church v. United States, 143 U.S. 457 (1981). The *Kulmerland* decision did not effectuate section 1304(5)'s objective; it allowed the carrier to avoid liability by holding the container to be a package. *Id.*

"Package" is a general term which should be construed according to the units contemplated by the legislators in 1936.[105] Containers were not considered by the legislators at the time of COGSA's enactment. The Second Circuit in *Mitsui* did not violate these rules of statutory construction per se; it nevertheless, did not go far enough to adequately protect the purposes of the Act.

## VI. Impact

By strictly following *Leather's Best*,[106] *Mitsui* failed to confront the container problem when there is no disclosure of the contents on the bill of lading.[107] In overlooking industry practices of nondisclosure, the court has left shippers without the assured protection COGSA was designed to afford because carriers are still able to unfairly limit their liability. The practical effect is that the carrier is absolutely exonerated from liability because shippers will be reluctant to sustain high litigation costs to recover a nominal recovery.

In the recent decision of *Smythgreyhound v. M/V Eurygenes*,[108] the Second Circuit effectively overruled *Kulmerland's* functional economics test and reinforced the general disclosure rule of *Mitsui*.[109] *Eurygenes* emphasized that *Leather's*

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105. *See* Hartford Fire Ins. Co. v. Pacific Far East Line, Inc., 491 F.2d at 963. "Since no specialized or technical meaning was ascribed to the word 'package,' we must assume that Congress had none in mind and intended that this word be given its plain, ordinary meaning." *Id. But see* Aluminios Pozuelo Ltd. v. S. S. Navigator, 407 F.2d 152, 156 (2d Cir. 1968). "Package" has become a term of art in the marine industry. The shipper should be held to the number of packages placed on the bill of lading whether it be the number or containers or the number of smaller units. *Id.*, Mitsubishi Int'l Corp. v. S. S. Palmetto State, 311 F.2d at 383. The definition of the word "package" should be classified as a shipping term; the layman's conception of the word is insignificant. *Id.*

106. *See generally* Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 519 (1974). In 1936, barrels, sacks, cartons, and drums were among the units classified as packages. *Id.*

*See* Edelman, *Cargo Claims Involving Containers*, N.Y.L.J., Mar. 6, 1981, at 2, col. 3. *See supra* notes 85-90 and accompanying text.

107. *See supra* text accompanying note 82, notes 95 and 98 and accompanying text.

108. 666 F.2d 746 (2d Cir. 1981). Although *Eurygenes* was decided after *Mitsui*, the district court decision was handed down prior to *Mitsui*. The district court applied the $500 package limitation to the containers because the shipper had a choice of shipping breakbulk or via containers; his choice of the latter method demonstrated an acquiescence in the package limitation being applied to the containers. *Id.* at 748.

109. *Id.* at 753.

*Best* and *Mitsui* established a distinct rule which does not involve a complex intent analysis which would involve the onerous task of proving motive at the time of the contract negotiations and finalization.[110] The *Eurygenes* court further analyzed that *Mitsui* did not place significance on the fact that the carrier in *Mitsui* did not verify the contents of the containers as was the case in *Leather's Best*.[111] Taking that analysis one step further leads to the following question: if verification of the contents is insignificant, why should the shipper be subject to a disclosure requirement?

In *Leather's Best*, the contents were verified by the carrier's agent thus *obligating* the carrier to issue a bill of lading showing the number of packages "as furnished in writing by the shipper."[112] The intent of the parties, therefore, was evident. In *Mitsui*, the bill of lading did not show intent because the contents were not verified. The carrier, therefore, was under no obligation to issue a bill of lading with the shipper's disclosure.[113] In each case there was disclosure; the significance of disclosure in *Leather's Best*, however, was that it evidenced the intent of the parties. Disclosure in *Mitsui* had no such significance; therefore, the court's reliance on *Leather's Best* to support its disclosure rule was misplaced. Because of the insignificance of disclosure in *Mitsui*, it was an appropriate occasion for the court to go beyond the *Leather's Best* requirements and hold that a container should never be a package. In refraining from doing so, *Mitsui* offers a narrow holding with a diminished impact; only when the facts of future cases are similar to *Mitsui* will the shipper be assured of adequate package limitation protection.

Although the *Mitsui* court criticized *Kulmerland's* limiting the carrier's liability to $500 per container when the value of the goods was many thousands of dollars, the court failed to recognize that this same inequitable result will occur whenever a shipper fails to disclose the contents of the container either through inadvertence or because shipping practices so dictate.[114] The

110. *Id.* *See supra* note 86 and accompanying text.
111. *Id.* at 751. *See supra* text accompanying notes 85-90.
112. 46 U.S.C. § 1303(3) (1976). *See supra* note 76.
113. *Id.* § 1303(3)(c). *See supra* notes 51-52 and accompanying text.
114. *See supra* note 95.

threat of such an inequitable result thwarts the purposes of COGSA, yet will persist until the courts establish that a container is never a package.

*Mitsui* has established a predictable test based on ownership and disclosure for the container/package problem that may reduce litigation.[115] This gain in predictability is at the expense of the more basic purpose of COGSA, to set a figure below which a carrier cannot limit his liability. Although the *Mitsui* court correctly held that the containers were not the packages, as precedent, it does not assure shippers that the containers will never be COGSA packages. The *Mitsui* requirements, therefore, do not guarantee that the primary purpose of COGSA will be enforced.

## VII. Recommendation

A container should never be a package regardless of the disclosure of the contents of the container or its ownership. Containers are standardized to meet the specifications of the containerships; as such, their function as a part of the ship should not change with ownership or disclosure. Once it is concluded that a container is not a package within the meaning of section 1304(5), the inquiry shifts to whether the contents of the container are shipped in packages or whether a customary freight unit should limit the carrier's liability.[116] This determination is more difficult when containers carry the goods since the container serves to decrease the amount of protection necessary for transportation; thus the goods will not require as much packaging had the container not been used. A corollary to this problem is that a court may be faced with complaints by carrier groups that the shipper's representations are not legitimate and that the carriers are being held liable for small packages of great value. This, however, is not a novel complaint and has been resolved by placing the burden of proof of the contents of the containers on the shipper and also by limiting carriers' liability to

115. *See supra* notes 34 and 86. Many times the ownership of the container is not discernible. In such cases, neither party will be assured of his burden of risk at the time of contract.

116. *See supra* note 3 and text accompanying note 75.

$500 per package or the value of the goods, whichever is less.[117]

It is this writer's recommendation that Congress enact supplemental COGSA legislation to include a container limitation which would measure the carrier's liability by either the value of the goods or the container limitation, whichever is less.[118] Such a limitation would serve the same basic purposes that the package limitation served to establish in 1936. Whenever goods are shipped via container, the carrier would be assured of its maximum liability by multiplying the amount set by Congress as the container limitation by the number of containers.[119] Such a limitation would obviate the risk that courts will set carriers' liability at insubstantial amounts in cases where the container is held to be a package. In addition, the container limitation would simplify the complex bill of lading and provide a uniform, predictable and fair liability test for all those engaged in marine transportation; thus reducing litigation.[120] Although *Mitsui* insures uniformity and predictability, it does not assure that carriers will make shippers whole for the losses they incur because it does not guarantee that the container will never be the $500 package.

The recommended container limitation provision would supplement section 1304(5) by stating that when goods are shipped in containers, the carrier's liability would not exceed a stated amount per container. Such a provision would be consistent with COGSA's statutory scheme thereby requiring no substantial changes.[121]

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117. *See infra* note 118.

118. The package limitation limits the carrier's liability to $500 per package; if the actual value of the cargo is less than $500 per package then the carrier's liability will be limited to the fair market value of the goods. *See supra* notes 3 and 59.

119. To establish a carrier's maximum liability under § 1304(5) the number of packages is multipied by $500. *See supra* note 3.

120. *See supra* notes 10-12 and accompanying text.

121. Section 1304(5) would become the container/package limitation:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States *or if goods are shipped in containers XXX per container lawful money of the United States,* or in case of goods not shipped in packages *or containers,* per customary freight unit, . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C. § 1304(5) (1976) (recommended legislation in italics).

## VIII. Conclusion

The *Mitsui* court correctly decided not to follow *Kulmerland* on the ground that the functional economics test was inconsistent with *Leather's Best* and it defeated the benefits of containerization. *Mitsui* unnecessarily limited its holding, however, by narrowly adhering to the principles announced in *Leather's Best*.[122] The Second Circuit showed a clear understanding of the purposes of COGSA and the evil sought to be remedied by that Act. Nonetheless, the court did not consider section 1303(3) of COGSA which renders disclosure of the number of units within the container irrelevant when such disclosure cannot be verified.[123] The court did not seize the opportunity to distinguish *Leather's Best* on the basis of the disclosure requirement and thus failed to announce a comprehensive rule consistent with the purposes of COGSA.

The *Mitsui* decision indicates a desire by the court to adhere to factors previously considered important in determining what is a package.[124] This is illustrated by the *Mitsui* requirements of disclosure of carrier-owned or carrier-furnished containers even when the court recognized that the container is a part of the ship.[125] The container is one or the other. If it is a part of the ship, the *Mitsui* requirements are meaningless because the container is not the package notwithstanding disclosure or ownership. The container does not cease being a part of the ship when a shipper fails to disclose information which the carrier is not bound to rely on or include on the bill of lading.

In 1936 Congress was concerned with precluding carriers from limiting liability to insubstantial amounts. Finding a container to be a package within the meaning of section 1304(5) serves to defeat this purpose by exonerating the carrier from liability.[126] If a container is considered to be a package, a shipper

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122. *See supra* notes 85-87, 106-113 and accompanying text.

123. *See supra* notes 90-92 and accompanying text.

124. *See supra* notes 19-20 and accompanying text.

125. *See supra* notes 96-97 and accompanying text.

126. *See supra* notes 106-07 and accompanying text. *See also* Simon, *Latest Developments in the Law of Shipping Containers*, 4 J. MAR. LAW & COM. 441, 442 (1972). Notwithstanding the clear liability of the carrier, if goods are placed into a single container and the cost of litigation exceeds $500, the practical effect would be no liability for the carrier. *Id.*

may decide not to litigate after balancing the costs of litigation with the prospects of a favorable judgment.[127] There is concern, therefore, not only with insubstantial liability, but also with no liability.

According to section 1304(5), disclosure of the nature and value of the goods within a container is necessary only when the value of the units within the container individually exceed $500.[128] If Congress intended to make such disclosure instrumental in defining the package it would have so indicated.

Although the *Mitsui* court correctly held that the containers involved were not section 1304(5) packages, its reasoning is limited as an equitable standard because it does not give sufficient protection to shippers.[129] Rules of statutory construction guide the courts and state that "the court should avoid the mischief which the statute was enacted to rectify."[130] *Mitsui* recognized the primary purpose of section 1304(5) and presented this very argument in support of its decision not to follow *Kulmerland*.[131] It nevertheless limited its holding to situations where there is disclosure of carrier-owned or carrier-furnished containers. These requirements do not further the purposes of section 1304(5)[132] and do not reflect marine industry practices.[133]

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127. *Id.*
128. *See supra* note 99 and accompanying text.
129. *See supra* note 115 and accompanying text.
130. *See supra* notes 104-105 and accompanying text.
131. *See supra* notes 72-76, 114 and accompanying text.
132. *See supra* notes 90-95 and accompanying text.
133. *See supra* note 95.